Supreme Court, U. S.
FILED
DEC 5 1975
MICHAEL RODAK, JR., CLERK

No. 74-1560

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

AMADO MARTINEZ-FUERTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
MARK L. EVANS,
Assistant to the Solicitor General,
SIDNEY M. GLAZER,
REUBEN H. WALLACE, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provision involved	2
Statement	2
Summary of argument	10
Argument	16
I. The stops of respondents' vehicles at the San Clemente checkpoint and the brief inquiries concerning the occupants' nationality and immigration status were reasonable under the Fouth Amendment without regard to the warrant authorizing such stops and inquiries	16
A. The important law enforcement interest at stake justifies the minimal intrusion involved in a brief stop and inquiry at a fixed checkpoint	16
1. Effective enforcement of the nation's immigration laws in the Mexican border areas requires routine stopping of vehicles at strategically placed traffic checkpoints for the purpose of making brief inquiries	17
2. A brief stop and inquiry at a fixed traffic checkpoint is significantly less intrusive than either a search for aliens at a checkpoint or a stop and inquiry by a roving patrol	28
B. The reasonableness of the checkpoint stop and inquiry procedure does not depend upon prior judicial approval through a warrant procedure	34
1. Advance judicial approval is unnecessary	35
2. A warrant procedure for checkpoints may frustrate legitimate law enforcement objectives	39

398-506—75——1

II. If advance judicial approval is needed to ensure the reasonableness of a checkpoint stop and inquiry procedure, the warrant here satisfied that need ---------- Page 42
A. The warrant is compatible with the Fourth Amendment, and it enhances the reasonableness of the stop and inquiry procedure at the checkpoint ---------- 44
B. The magistrate correctly determined that the stop and inquiry procedure at the San Clemente checkpoint would be reasonable in light of the governmental need and the limited scope of the intrusion contemplated-- 49
Conclusion ---------- 59
Appendix ---------- 61

CITATIONS

Cases:

Almeida-Sanchez v. *United States*, 413 U.S. 266------ 3, 9, 10, 15, 18, 36, 37–38, 42, 44, 45, 46, 47, 48, 49, 50
Bowen v. *United States*, No. 73–6848, decided June 30, 1975 ---------- 10
Camara v. *Municipal Court*, 387 U.S. 523------ 42, 45, 46, 47
Cardwell v. *Lewis*, 417 U.S. 583---------- 13, 36
Carroll v. *United States*, 267 U.S. 132---------- 31
Saxbe v. *Bustos*, 419 U.S. 65---------- 27
Sifuentes v. *United States*, No. 75–5387, certiorari granted November 11, 1975---------- 34
Terry v. *Ohio*, 392 U.S. 1---------- 35
United States v. *Baca*, 368 F. Supp. 398---------- 3, 18, 20, 25, 26, 33, 39, 40, 47, 49, 50, 51, 52, 53, 55, 56, 57
United States v. *Bowman*, 487 F. 2d 1229---------- 25
United States v. *Brignoni-Ponce*, No. 74–114, decided June 30, 1975---------- 10, 11, 12, 13, 16, 17, 18, 21, 24, 26, 28, 29, 33, 35
United States v. *Esquer-Rivera* 500 F. 2d 313--------- 8
United States v. *Evans*, 507 F. 2d 879, certiorari denied, June 30, 1975, No. 74–6055---------- 58
United States v. *Fuentes*, 379 F. Supp. 1145, affirmed, 517 F. 2d 1401---------- 52

Cases—Continued

United States v. *Hart*, 506 F. 2d 887, vacated and remanded, June 30, 1975, No. 74–6014---------- Page 52
United States v. *Juarez-Rodriguez*, 498 F. 2d 7--------- 8
United States v. *Morey*, C.A. 9, No. 75–1332 decided June 10, 1975---------- 24, 67
United States v. *Ortiz*, No. 73–2050, decided June 30, 1975 ---------- 10, 13, 20, 29, 30, 31, 32, 33, 36–37
United States v. *Osborne*, C.A. 9, No. 75–1595, decided July 3, 1975---------- 22, 65
United States v. *Santibanez*, 517 F. 2d 922---------- 25
United States v. *United States District Court*, 407 U.S. 297 ---------- 14, 15, 34, 35, 36, 37, 43, 48, 49

Constitution, statutes rules, and regulations:

U.S. Constitution:
Fourth Amendment---------- 2, 10, 11, 15, 19, 29, 33, 34, 35, 38, 39, 44, 45, 48
8 U.S.C. 1304(e)---------- 29
8 U.S.C. 1324---------- 46
8 U.S.C. 1324(a)(2)---------- 6, 7
8 U.S.C. 1324(a)(4)---------- 7
8 U.S.C. 1325---------- 46
8 U.S.C. 1326---------- 46
8 U.S.C. 1357(a)---------- 19
18 U.S.C. 371---------- 6, 7
18 U.S.C. 911---------- 46
18 U.S.C. 1546---------- 46
18 U.S.C. 3731---------- 7, 37
Rule 41(a), Fed. R. Crim. P---------- 40
8 C.F.R. 212.6---------- 55

Miscellaneous:

Gardner, *Ninth Circuit's Unpublished Opinions: Denial Of Equal Justice?*, 61 A.B.A.J. 1224 (1975)---- 24
2 Gordon and Rosenfield, *Immigration Law and Procedure*, §§ 9.22–9.40 (1975)---------- 46
H.R. 8713, 94th Cong., 1st Sess---------- 27
H.R. Rep. No. 94–506, 94th Cong., 1st Sess. (1975)--- 27
Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F. L. Rev. 219 (1974) ---------- 24

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1560

UNITED STATES OF AMERICA, PETITIONER

v.

AMADO MARTINEZ-FUERTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 514 F. 2d 308.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44a-45a) was entered on March 5, 1975. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on April 17, 1975 (Pet. App. 46a-47a). On May 12, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 16, 1975. The petition was filed on June 11, 1975, and was granted on October 6, 1975

(A. 59). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Border Patrol officers, acting pursuant to a judicial warrant issued upon a showing of area-type probable cause, may lawfully stop northbound vehicles at a fixed immigration traffic checkpoint in the Mexican border area in order to make routine inquiries concerning the nationality and immigration status of the occupants of the vehicles.

2. Whether the judicial warrant in this case, assuming that a warrant was necessary to justify the stops, was issued upon an adequate showing of area-type probable cause.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This case involves three separate prosecutions in the United States District Court for the Southern District of California for offenses relating to the transportation of aliens who were present in this

country unlawfully. In each case, the vehicle in which the respondent was traveling was stopped by Border Patrol officers at the permanent immigration traffic checkpoint on Interstate Route 5 near San Clemente, California, and the officers' inquiries concerning the nationality and immigration status of the vehicle's occupants led to the discovery of one or more illegal aliens.

In each case, the checkpoint operations were conducted pursuant to a "warrant of inspection" issued by a United States magistrate on June 22, 1974 (A. 52–53). The government's application for the warrant (A. 44) was supported by the affidavits of Robert D. McCord, Assistant Chief Patrol Agent assigned to the Chula Vista Sector of the United States Border Patrol (A. 45–48, 49), and Richard Wischkaemper, Assistant Regional Commissioner, Border Patrol, for the Southwest Region of the United States Immigration and Naturalization Service (A. 50–51), as well as the evidence presented during a consolidated hearing in the United States District Court for the Southern District of California before Judge Howard B. Turrentine on November 19, 20, and 21, 1973, and the court's findings of fact in those cases. See *United States* v. *Baca*, 368 F. Supp. 398 (S.D. Cal.).[1]

[1] The district court issued an *en banc* general order in October 1973, providing for a limited consolidation of the large number of criminal cases then pending before it involving "constitutional questions left open" by this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (368 F. Supp. at 401). After several days of hearing, Judge Turrentine issued a com-

The magistrate reviewed and considered the McCord and Wischkaemper affidavits, the district court's findings in *Baca,* and portions of the transcript of the consolidated hearing in *Baca* (A. 52). He concluded that "there is probable cause to believe that mass violations of the Immigration laws of the United States * * * have been and are being committed" at the location of the San Clemente checkpoint (*ibid.*). He accordingly issued a warrant empowering authorized officers of the Immigration and Naturalization Service "to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, * * * to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and * * * to conduct a routine inspection of said

prehensive opinion containing detailed findings on the causes and consequences of the widespread illegal entry of aliens from Mexico, the difficult law enforcement problems confronting the Border Patrol in its efforts to maintain an effective deterrent and to apprehend illegal entrants, the role of the Border Patrol's fixed immigration checkpoints in the overall law enforcement program, and the placement and operating characteristics of each of the checkpoints in the Southern District of California. A copy of the transcript in the *Baca* hearing was lodged with the district court in Crim. No. 74–1350 (*Martinez-Fuerte*), and an order was subsequently entered making that transcript a part of the record in *Martinez-Fuerte* (A. 2). In addition, the three cases here were consolidated by the court of appeals, and the record on appeal in each case was supplemented with the entire transcript of the *Baca* proceedings (Pet. App. 9a).

We are lodging a copy of that three-volume transcript with the Clerk of this Court. Citations to "*Baca* Tr." refer to that transcript.

vehicles for the presence of aliens" (A. 52–53). The warrant authorized operation of the checkpoint at any time of the day or night "since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose" (A. 53).[2]

1. (a) At approximately 8:00 p.m. on June 24, 1974, Border Patrol officers at the San Clemente checkpoint stopped a vehicle driven by respondent Martinez-Fuerte and containing two female passengers. The vehicle was directed to the secondary inspection area, where an officer questioned the occupants concerning their right to be in the United States. Martinez-Fuerte produced documentation showing that he was a lawful resident alien, but his two female passengers admitted that they were citizens of Mexico who were present in this country unlawfully. (Pet. App. 3a; A. 40–41.)

The district court denied Martinez-Fuerte's motion to suppress (A. 28). The evidence at his subsequent jury trial, including the testimony of the two aliens who were found in the vehicle and the Border Patrol agent who found them, showed that the aliens crossed the border illegally on foot and took a bus from San Ysidro to San Diego, where they met Martinez-Fuerte at the San Diego bus terminal. They were bound for Los Angeles when the vehicle in which they were rid-

[2] The warrant also directed the Immigration and Naturalization Service to file within 10 days a written return on the warrant giving detailed statistics on the operation of the checkpoint during that period (A. 53). The return on the warrant appears at A. 54.

598-306—75——2

ing was stopped at the San Clemente checkpoint (Tr. 21–28, 42–49).

Martinez-Fuerte was convicted on two counts of transporting aliens present in this country unlawfully, in violation of 8 U.S.C. 1324(a)(2).[3] He was sentenced to concurrent terms of three years' imprisonment. The court directed, however, that respondent be confined in a jail-type or treatment institution for six months, that execution of the remainder of the sentence be suspended, and that respondent be placed on probation for a period of five years (A. 42). He appealed from the judgment of conviction.

(b) Also on June 24, 1974, Border Patrol officers at the San Clemente checkpoint stopped a car driven by respondent Jiminez-Garcia and containing one passenger. Questioning by the officers revealed that the passenger was present in the United States illegally. (Pet. App. 3a–4a; A. 19.)

Jiminez-Garcia was charged in a two-count indictment with transporting an alien present in this country unlawfully, in violation of 8 U.S.C. 1324(a)(2), and with conspiring to commit that offense, in violation of 18 U.S.C. 371 (A. 11–13). The parties stipulated that the alien would testify that he made arrangements with an unknown person in Tijuana, Mexico, to be smuggled into the United States and transported to Los Angeles, that he was guided across

[3] In addition to the two counts on which he was convicted (counts 2 and 3), respondent was also charged with two counts of inducing the illegal entry of the aliens (counts 4 and 5) and one count of conspiring to transport, conceal, and induce the illegal entry of the aliens (count 1) (A. 7–10). Those counts were dismissed pursuant to the government's motion (A. 2, 29–30).

the border to a residence in San Ysidro, California, and that he was subsequently picked up by Jiminez-Garcia and transported to his point of apprehension at the San Clemente checkpoint (A. 19).

The district court granted respondent's motion to suppress the evidence derived from the stop of his vehicle (A. 34), and the government appealed pursuant to 18 U.S.C. 3731.

(c) On June 28, 1974, Border Patrol officers at the San Clemente checkpoint stopped a car driven by respondent Guillen, in which respondent Medrano-Barragan and his wife were passengers. The officers discovered, upon questioning the occupants, that Medrano-Barragan and his wife were illegally in the country. The officers then searched the car and found three other illegal aliens in the trunk. (Pet. App. 4a.)

Guillen and Medrano-Barragan were jointly indicted on four counts of transporting aliens illegally in this country, four counts of inducing the illegal entry of aliens, and one count of conspiring to commit those offenses, in violation of 8 U.S.C. 1324(a)(2) and (a)(4) and 18 U.S.C. 371 (A. 14–18). The parties stipulated that the four aliens other than Medrano-Barragan would testify that Medrano-Barragan led them across the border from Mexico clandestinely and that they thereafter entered Guillen's car for the drive north (A. 21–24).

The distict court granted respondents' motions to suppress the evidence derived from the stop of Guillen's car (A. 37–38), and the government appealed pursuant to 18 U.S.C. 3731.

(d) The government does not contend that the Border Patrol officers who stopped respondents' vehicles in each case had traditional probable cause or reasonable suspicion, in the sense of specific knowledge about the particular vehicle stopped, that led them to believe that the vehicles contained aliens who were illegally in the country.

2. The three cases were consolidated for argument and decision by the court of appeals. At the time the cases were briefed and argued, the court of appeals had already held that stops of vehicles at immigration checkpoints, for the purpose of asking the occupants about their right to be in this country, were unlawful in the absence of a warrant, unless the officer had "a reasonable belief, founded upon 'articulable' facts, that one or more of the people to be interrogated are aliens illegally in the country." *United States* v. *Esquer-Rivera,* 500 F. 2d 313, 314 (C.A. 9). See also *United States* v. *Juarez-Rodriguez,* 498 F. 2d 7 (C.A. 9). The government's brief in the court of appeals in *Martinez-Fuerte* nevertheless preserved the point, arguing that "the traffic checkpoints can be operated under the statute with or without prior judicial approval by way of a warrant" (pp. 24–25). The court of appeals rejected the contention on the authority of its prior decisions (Pet. App. 15a–16a) and framed the principal question before it as "whether the warrant of inspection somehow transforms otherwise unreasonable seizures into constitutional ones" (*id.* at 16a).

The court ruled, with one judge dissenting, that "the warrant is invalid and that the checkpoint operations

which it purports to authorize violate the Fourth Amendment of the Constitution" (*id.* at 2a). The majority held that the warrant was defective because it "is not based on any probable cause or even founded suspicion focussed on any particular individual or vehicle" (*id.* at 19a).

The court rejected as "unsatisfactory" (*id.* at 24a) the area warrant procedure suggested by Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 275–285. The court stated (Pet. App. 24a):

> We cannot accept the notion that an area warrant can constitutionally authorize immigration checkpoint operations in the interior of the United States because we think that the analogy to the administrative inspection cases is inapt and because we think that the concept of an area warrant, under these circumstances, is contrary to certain fundamental precepts of the Fourth Amendment, as revealed by its antecedent history.

The majority also stated that "the San Clemente checkpoint does not meet the standards sketched by Justice Powell in his concurrence in *Almeida*" (*id.* at 33a), because the percentage of automobiles passing through the San Clemente checkpoint that contain illegal aliens is too small, the checkpoint is too far from the Mexican border and lacks "an essential nexus with the border" (*id.* at 34a), and the interference with the traveling public is too great.

Judge Carter dissented. He noted (*id.* at 37a) that the four dissenting Justices in *Almeida-Sanchez,* while disagreeing with Mr. Justice Powell concerning the

need for an area warrant, expressly agreed that "such a warrant so issued would satisfy the Fourth Amendment" (413 U.S. at 288). Emphasizing that the cases involved only stops for interrogation and not random searches of automobiles, Judge Carter concluded that the warrant for the San Clemente checkpoint was valid and that the stopping of respondents' vehicles was reasonable under the Fourth Amendment.

In light of the majority's conclusion that the "checkpoint operations under the warrant of inspection [were] constitutionally unreasonable" and that "evidence obtained as a result of the traffic check in each case should have been suppressed" (Pet. App. 35a), the court reversed the conviction of Martinez-Fuerte and affirmed the district court's orders suppressing the evidence in the other cases.[4]

SUMMARY OF ARGUMENT

I

A. The constitutional validity of the Border Patrol's checkpoint stop and inquiry procedure must be tested under "the reasonableness requirement of the Fourth Amendment" (*United States* v. *Brignoni-Ponce,* No. 74–114, decided June 30, 1975, slip op. 8–9), and the reasonableness of the operation "depends on a balance between the public interest and the

[4] The court denied the government's petition for rehearing and rejected a suggestion for rehearing *en banc* (Pet. App. 46a–47a). It stayed its mandate, however, pending this Court's decisions in *United States* v. *Ortiz*, No. 73–2050, and *Bowen* v. *United States*, No. 73–6848, decided June 30, 1975. The petition for a writ of certiorari was filed prior to the date of those decisions.

individual's right to personal security free from arbitrary interference by law officers" (*id.* at 5). The Court's view of that balance in *Brignoni-Ponce* led it to conclude that officers on roving patrol may stop vehicles to inquire about the occupants' citizenship and immigration status "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country" (slip op. 11).

That limitation on roving patrol stops should not be applied to checkpoint stops, because the differences between roving patrol and checkpoint operations significantly affect both sides of the reasonableness balance. The law enforcement need to conduct routine stops and inquiries at checkpoints is substantially greater, and the intrusions upon protected Fourth Amendment interests are substantially reduced.

Although roving patrols have been an important part of the Border Patrol's traffic checking program, they have always been viewed as essentially supplementary to the checkpoints, which (together with the line watch) are the heart of the enforcement effort. Stops and inquiries at checkpoints have been the single most important traffic checking operation, in terms both of apprehending deportable aliens and of deterring unlawful entry. Experience has shown that most illegal transportation of aliens occurs on the major roads leading north from the Mexican border—the roads on which the traffic checkpoints are located—and that a stop and brief inquiry frequently reveals

the presence of illegal entrants in the passenger compartment of the vehicle or leads to probable cause warranting a search of the vehicle's interior.

Except in rare cases, however, the checkpoint officer is not in a position to observe an approaching vehicle for a long enough time to determine, *before* the stop and inquiry, whether there is reason to believe that the vehicle contains illegal entrants. Unlike a roving patrol officer, whose mobility allows him an extended opportunity to observe a vehicle for suspicious signs, the checkpoint officer is stationary and has only a fleeting opportunity to decide whether a stop and inquiry is warranted. Although many checkpoint stops are in fact made on the basis of articulable factors, those factors might not, in many cases, amount to a "reasonable suspicion" of illegal activity. Moreover, in order for a checkpoint to pose a meaningful risk of detection for even the most carefully disguised professional smuggling operations, some stops must be made on an essentially random basis. Unlike the situation in *Brignoni-Ponce,* therefore, a reasonable suspicion requirement for checkpoint stops would not allow "the Government adequate means of guarding the public interest" (slip op. 10).

Moreover, a checkpoint stop and inquiry is significantly less intrusive than a similar procedure on roving patrol. The motorist is not pursued by a patrol car with siren and flashing lights. A stop at a checkpoint involves little more of an interruption in travel than that caused by a traffic light or a stop sign.

Also significant is the fact that an officer at a checkpoint has no "discretion to search private automobiles," as in *United States* v. *Ortiz,* No. 73–2050, decided June 30, 1975, slip op. 5. Nor does he have discretion to "stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road," as in *Brignoni-Ponce* (slip op. 9). A checkpoint officer has no roving mandate to stop cars anywhere in the border area. His responsibilities are limited to a fixed location, strategically selected by high-level Border Patrol officials to maximize its deterrent impact while minimizing the interference with lawful traffic.

B. Although the stop and inquiry procedure here was authorized in advance by a federal magistrate—a fact, as we argue below, that contributes to the reasonableness of the operation—we think the procedure was reasonable regardless of the warrant. Advance judicial approval is unnecessary to assure the reasonableness of the practice because the brief stop and relatively innocuous verbal exchange do not "invade * * * a right to privacy which the interposition of a warrant requirement is meant to protect" (*Cardwell* v. *Lewis,* 417 U.S. 583, 589 (plurality opinion)), and because the fixed location and consistent operation of a checkpoint minimizes the need for repeated *ex parte* judicial approval in *advance* of its operation during a particular week or month.

Moreover, a warrant requirement could frustrate the legitimate law enforcement objectives served by checkpoints. The deterrent effectiveness of each of the Border Patrol's 47 checkpoints in the Mexican border area depends largely on the coordinated oper-

598-506—75——3

ation of the entire network. For a judicial officer to review in advance the basic agency decision to operate a particular checkpoint would require consideration of information relating to coordinate checkpoints as well, often including checkpoints located in other judicial districts. Denial of a warrant for one checkpoint could seriously disrupt the coordination and reduce the deterrent effectiveness of the entire system, and appellate review may be unavailable.

Moreover, the need to operate some less frequently used checkpoints may arise unexpectedly because of unanticipated information, weather or manpower conditions, or strategic considerations. An application for a checkpoint warrant, however, may take too long. The result of a warrant requirement in such circumstances may be to confine the Border Patrol's enforcement efforts to those checkpoints that are operated regularly and thereby to diminish materially the deterrent effectiveness of traffic checking operations as a whole.

II

A. If any doubt remains concerning the reasonableness of the stop and inquiry procedure followed here, the warrant—issued by a magistrate on a showing of "probable cause to believe that mass violations of the Immigration laws" were being committed at the location of the San Clemente checkpoint (A. 52)—should eliminate that doubt.

Although the focus of the warrant is unavoidably "less precise than that directed against more conventional types of crime" (*United States* v. *United States District Court*, 407 U.S. 297, 322), the unique law enforcement problem justifies an unconventional solution. "Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government * * * and the protected rights of our citizens" (*id.* at 322–323). Five Justices expressed the view in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, that a warrant authorizing routine roving patrol searches of automobiles in a prescribed area may issue, consistent with the Fourth Amendment, on the basis of area-type probable cause. The warrant here is even more clearly compatible with the Fourth Amendment, for it authorizes a far less substantial invasion and is limited to a particular fixed location rather than an area encompassing many square miles.

Even if the magistrate's advance approval of the operation cannot properly be labeled a "warrant" within the strict meaning of the second clause of the Fourth Amendment, it does reflect a "prior judicial judgment" (*United States* v. *United States District Court, supra*, 407 U.S. at 317) that the legitimate needs of law enforcement justify the limited intrusions that result from the checkpoint stop and inquiry procedure. That prior judgment is entitled to weight in the reasonableness balance.

B. The magistrate's finding of probable cause was amply supported by the affidavits and other materials presented to him. The San Clemente checkpoint is the primary checkpoint in Southern California. It is strategically located at a point on Interstate Route 5 where the concentration of illegally transported aliens is high and the overall volume of traffic is relatively

low. The checkpoint acts as a powerful deterrent to illegal entry and transportation of aliens.

Moreover, only a small fraction of the vehicles that pass the checkpoint during its hours of operation are stopped to permit inquiry concerning the occupants' nationality and immigration status. Those that are stopped are detained for only a few minutes. Though the interference with lawful traffic is thus kept to a minimum, the deportable alien apprehension rate at the checkpoint is high. The magistrate struck a proper balance between the legitimate needs of the Border Patrol and the rights of innocent travelers.

ARGUMENT

I

THE STOPS OF RESPONDENTS' VEHICLES AT THE SAN CLEMENTE CHECKPOINT AND THE BRIEF INQUIRIES CONCERNING THE OCCUPANTS' NATIONALITY AND IMMIGRATION STATUS WERE REASONABLE UNDER THE FOURTH AMENDMENT WITHOUT REGARD TO THE WARRANT AUTHORIZING SUCH STOPS AND INQUIRIES

A. THE IMPORTANT LAW ENFORCEMENT INTEREST AT STAKE JUSTIFIES THE MINIMAL INTRUSION INVOLVED IN A BRIEF STOP AND INQUIRY AT A FIXED CHECKPOINT

An investigative stop of a vehicle is a seizure under the Fourth Amendment, but, like a street encounter, it "involve[s] only a brief detention short of traditional arrest" (*United States* v. *Brignoni-Ponce,* No. 74–114, decided June 30, 1975, slip op. 4). The stop and inquiry procedure followed by the Border Patrol officers in this case must therefore be tested under "the reasonableness requirement of the Fourth Amendment" (*id.* at 8–9). And, as this Court stated in the

context of roving patrol stops, "the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers" (*id.* at 5).

In *Brignoni-Ponce,* the Court was "not convinced that the legitimate needs of law enforcement require [the] degree of interference with lawful traffic" that would result if "Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law" (*id.* at 9–10). Consequently, the Court was "unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops" (*id.* at 8).

The stops and inquiries in this case were conducted not by officers on roving patrol but at the Border Patrol's most important immigration traffic checkpoint. That difference is of controlling significance, for it substantially affects both sides of the reasonableness balance—the extent of the law enforcement need and the nature of the official intrusion.

1. *Effective enforcement of the nation's immigration laws in the Mexican border areas requires routine stopping of vehicles at strategically placed traffic checkpoints for the purpose of making brief inquiries*

a. The effective policing of our national boundaries to prevent the illegal entry of aliens, particularly in the area of our land border with Mexico, presents ex-

traordinarily difficult law enforcement problems. Rather than reiterating the lengthy description of those problems that we presented in our briefs last Term in *Brignoni-Ponce* and *United States* v. *Ortiz*, No. 73-2050,[5] and that appears in the district court's opinion in *United States* v. *Baca*, 368 F. Supp. 398 (S.D. Cal.),[6] we are content to quote this Court's brief summary in *Brignoni-Ponce* (slip op. 6):

> The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers."

Because "it is the automobile which in most cases makes effective the attempts to smuggle aliens into this country" (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 279, concurring opinion of Mr. Justice Powell), the Border Patrol has found that traffic checking operations are absolutely essential "[i]f there is to be any hope of intercepting illegal entrants

[5] We have furnished respondents' counsel with copies of our briefs in those cases.

[6] Pertinent portions of the district court's opinion in *Baca* are appended to the concurring opinion of the Chief Justice in *Brignoni-Ponce*, slip op. 3–16.

and of maintaining any kind of credible deterrent" (*id.* at 293, dissenting opinion of Mr. Justice White). However, "it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country" (*id.* at 276–277, concurring opinion of Mr. Justice Powell).

Until this Court's decisions in *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce*, the Border Patrol, exercising the authority conferred by Congress in 8 U.S.C. 1357(a), responded to this difficult law enforcement problem by conducting a comprehensive traffic checking program in the border area—a program that included some routine stopping and searching of vehicles for aliens both at checkpoints and on roving patrols. Significant aspects of that program have been found unreasonable under the Fourth Amendment. The Border Patrol now conducts searches of vehicles only on the basis of probable cause or consent, and it stops vehicles on roving patrol only on the basis of reasonable suspicion.

What is left of the original traffic checking program—routine stops for the purpose of brief inquiries at fixed checkpoints—has always been the single most important element of the enforcement plan, in terms both of apprehending illegal entrants and of deterring unauthorized entry. As we indicated in oral argument before this Court in *Ortiz*, although roving patrol operations have historically been an important part of the Border Patrol's traffic checking program, "they have always been essentially supplementary to the

checkpoints themselves which are the heart of the enforcement effort" (Tr. 19). And see our brief in *Ortiz,* p. 24. Experience has shown that most of the inland vehicular movement of illegal entrants is on the major highways leading north from the border, and it is on those roads that the fixed checkpoints are placed, forming an "effective obstacle" to such inland movement. *United States* v. *Baca, supra,* 368 F. Supp. at 407.

Moreover, although it has been the Border Patrol's experience that a truly effective deterrent requires the authority on occasion to conduct a physical inspection of some vehicles in order to determine whether aliens are concealed in them, it is also true that only a small proportion of the illegal entrants actually apprehended at traffic checkpoints are found concealed in compartments (see Tr. of oral argument in *Ortiz,* pp. 13, 15). A brief stop and inquiry obviously cannot accomplish all the enforcement objectives that would be achieved by a limited search for concealed aliens. But, as the facts in the present case indicate, many illegal entrants are discovered riding in the passenger compartments of vehicles, and an experienced officer's observations at the time of a stop frequently give him probable cause to believe that the vehicle does contain concealed aliens (see *Ortiz,* slip op. 6–7).

Thus, while the absence of routine roving patrol stops and checkpoint searches undoubtedly makes it easier for illegal entrants to evade detection, routine checkpoint stops remain an effective and essential means of immigration law enforcement. Nine-month

statistics for the San Clemente checkpoint, compiled at a time when neither routine roving patrol operations nor routine checkpoint searches were being conducted, show that officers stopped 12,007 vehicles (less than one-half of one percent of those that passed the checkpoint during its hours of operation) and found a total of 8,591 deportable aliens in 2,998 (or about 25 percent) of the vehicles stopped (Pet. App. 56a, 63a).

Officers assigned to checkpoint operations, particularly at San Clemente, where traffic is heavy, endeavor to stop for inquiry only those vehicles that appear to the officers to "break * * * the pattern" of normal traffic (*Baca* Tr. 325). Some of the factors that may lead an officer to conclude that a brief stop is warranted are stated in the opinion in *Brignoni-Ponce,* slip op. 11–12. In many cases, however, particularly those involving professional smugglers, it is simply not possible until *after* a stop and inquiry to observe suspicious signs suggesting the possible presence of illegal entrants. If the checkpoints are to function effectively as a deterrent to illegal entry, they must pose a serious obstacle to the professional as well as the unsophisticated. For that reason, the Border Patrol has considered it essential to make some stops on an essentially random basis, so that even the most carefully disguised smuggling operation will face some risk of detection at a checkpoint.

A requirement that officers must have a "reasonable suspicion" before stopping a vehicle at a checkpoint would substantially undermine the deterrent

598-506—75——4

effectiveness of the checkpoints and make it difficult, if not impossible, to operate them productively. Officers on roving patrol are able to follow a vehicle and observe it at reasonably close range for a long enough period to determine whether there are objective, articulable facts that amount to a reasonable suspicion that the vehicle may contain aliens who are illegally in the country. Officers at a checkpoint, by contrast, have only a fleeting opportunity to observe vehicles as they approach the checkpoint and are seldom in a position to determine whether there is a "reasonable suspicion" of illegal activity.

Some vehicles are stopped at checkpoints on the basis of articulable factors suggesting a break in the pattern of normal traffic. But there is an obvious limit to what even a trained and experienced officer can observe in a brief glance at an approaching vehicle, and the factors that may suggest a break in the traffic pattern may not amount to a "reasonable suspicion" as that phrase was used by the Court in *Brignoni-Ponce*. Indeed, if the Ninth Circuit's application of the reasonable suspicion standard in recent decisions represents a correct understanding of the governing test, it may be impossible except in the most extraordinary circumstances for a checkpoint officer to observe facts sufficient to warrant a stop on that basis.[7]

[7] The decision in *United States* v. *Osborne*, C.A. 9, No. 75–1595, decided July 3, 1975 (reproduced in the Appendix to this brief, *infra*, p. 65) highlights the problem. A customs patrol officer on roving patrol stopped a suspicious vehicle near the border, smelled marihuana from outside the vehicle as he approached it, and subsequently found a large quantity of the substance in the vehicle's trunk. The district court denied a motion to suppress, concluding, on the basis of the following findings of fact (contained in an order reproduced in the Appendix, *infra*, pp. 61–64), that the officer had a founded suspicion justifying the stop (*id.* at 61-62; footnote omitted):

"At approximately 11:45 o'clock a.m., November 11, 1974, Supervisory Customs Patrol Officer J. C. Padalino observed a 1969 white over red Ford Galaxie traveling north at Milepost 2, approximately two miles north of the United States-Mexico International Boundary. The defendant was the driver of the vehicle. Officer Padalino noticed that the car was riding low, despite the fact that it appeared to have heavy duty "air shocks". The vehicle did not have a trailer hitch. Padalino also observed what appeared to be fingerprint smudges on the vehicle's trunk.

"Through a radio check, Padalino discovered that the vehicle was registered to Richard R. or M. E. Quiroz, of Kearny, Arizona. Kearny is some one hundred miles north of the International Boundary. Officer Padalino noted that the name "Quiroz" is of Mexican or Spanish origin, while the driver of the subject vehicle appeared to be of Anglo-American origin.

"While awaiting the results of the registration check, Padalino observed that the defendant displayed numerous nervous characteristics. The vehicle, which was first observed traveling at approximately the posted speed limit of fifty-five miles per hour, slowed down to a speed of forty miles per hour. When Padalino followed the subject vehicle, the defendant repeatedly looked through his rear view mirror. His vehicle swerved on the roadway. When Padalino would drive his vehicle in the lane adjacent to the defendant's vehicle, the defendant would not look at Padalino or Padalino's marked Patrol vehicle. Padalino noted that the defendant sat very rigid in the driver's seat, maintaining a firm grip on the steering wheel with one hand, while moving his other hand nervously.

"Because of these circumstances, Padalino stopped the defendant's vehicle at approximately Milepost 10 on Interstate 19.* * *"

The court of appeals reversed the conviction. Its unpublished

Thus, while the Court in *Brignoni-Ponce* concluded that "a requirement of reasonable suspicion for stops

allows the Government adequate means of guarding the public interest" (slip op. 10), that conclusion was bottomed in part upon "the character of roving-patrol stops" (*id.* at 10, n. 8). Because of the quite different character of checkpoint stops, a reasonable suspicion requirement for those operations would *not* leave the Border Patrol with adequate means for achieving legitimate law enforcement objectives.

After the Ninth Circuit's decision in the present case, in effect imposing a reasonable suspicion requirement for checkpoint stops, and in light of the Ninth Circuit's rulings on the contours of the "founded suspicion" concept (see note 7, *supra*), the Border Patrol felt it had little choice but to abandon most

---

opinion stated, in full: "The facts are too thin to sustain founded suspicion. On remand, the indictment will be dismissed" (App., *infra*, p. 65). Compare *United States* v. *Morey*, C.A. 9, No. 75-1332, decided June 10, 1975 (reproduced at App., *infra*, pp. 67–70), where, on facts nearly identical to those in *Osborne*, the court of appeals concluded that "[t]here was ample justification for the stop" (*id.* at 67).

We did not file a petition for a writ of certiorari in *Osborne* principally because of the essentially factual nature of the decision, and we do not here argue its merits. What the decision illustrates is that it is difficult even for officers on roving patrol to develop a "reasonable suspicion" sufficient to satisfy some panels of the Ninth Circuit. For the reasons indicated in the text, that difficulty would be intensified for an officer at a checkpoint, whose opportunity to observe a moving vehicle is drastically reduced.

We note that the Ninth Circuit's erratic application of the founded suspicion standard has been the subject of recent scholarly criticism. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224, 1226 (1975); Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F. L. Rev. 219 (1974).

checkpoint operations in California and Arizona.[8] It concluded that a reasonable suspicion requirement would so limit the effectiveness and productivity of the checkpoints that continued allocation of resources to checkpoint operations would not be justified.

With the substantial deterrent effect of the checkpoints thus eliminated, illegal entrants can now freely travel inland without substantial risk of apprehension through traffic checking operations. The Immigration and Naturalization Service has informed us that, as might be expected, the formerly high price charged by smugglers to assist aliens in entering this country illegally and traveling inland (see *United States* v. *Baca*, *supra*, 368 F. Supp. at 408; *Baca* Tr. 185, 411, 421–422) has dropped dramatically. That information tends to confirm the district court's finding in *Baca* that "[t]he checkpoints are the major reason for such

---

[8] The government sought to renew the warrant for the San Clemente checkpoint in order to maintain operations there pending further judicial review. District Judge Turrentine, and thereafter Circuit Judge Carter, while concluding on the basis of the government's applications that "there exists probable cause to operate the checkpoint at this time" (Pet. App. 48a, 49a), felt constrained to deny the applications because of the decision in this case. Consequently, following the expiration of warrants that were outstanding on the date of the court of appeals' decision in this case, the Border Patrol ceased routine traffic checking operations at all checkpoints within the jurisdiction of the Ninth Circuit.

In the Fifth and Tenth Circuits, where the courts of appeals have approved the warrantless stop and inquiry procedure at checkpoints (*United States* v. *Santibanez*, 517 F. 2d 922 (C.A. 5); *United States* v. *Bowman*, 487 F. 2d 1229 (C.A. 10)), the Border Patrol has continued its routine checkpoint operations without obtaining judicial warrants.

a high price and if they were discontinued for any length of time it would be one more encouragement to illegal immigration" (368 F. Supp. at 408).

In sum, the legitimate governmental interest in making routine stops of vehicles at checkpoints is substantially greater than the interest in making such stops on roving patrol, both because the checkpoint operations are more important to the Border Patrol's enforcement effort and because a requirement of reasonable suspicion would be unworkable at a checkpoint.

b. The court of appeals thought that the Border Patrol's enforcement problems could be solved by means other than routine checkpoint stops (Pet. App. 25a–27a). But the alternatives suggested by the court would neither wholly eliminate the problem nor obviate the need for an effective means of deterring vehicular transportation of illegal immigrants on the major roads.

The court of appeals suggested that the Border Patrol could intensify efforts on the line watch to prevent surreptitious illegal border crossings (Pet. App. 25a–26a). As the evidence in the *Baca* hearing amply demonstrated, however, and as this Court recognized in *Brignoni-Ponce,* "even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings" (slip op. 6); "[i]ncreased manpower on line watch would not make that activity appreciably more effective" (368 F. Supp. at 405). See the government's reply brief in *Ortiz,* pp. 3–5.

The court of appeals also suggested that Congress could reduce the economic incentive that attracts illegal entrants from Mexico "by imposing sanctions on employers who hire 'illegal' aliens". (Pet. App. 26a). See Mr. Justice White's concurring opinion in *Brignoni-Ponce* and *Ortiz.* Several bills designed in part to impose such sanctions have been considered by Congress in recent years, and a freshly revised version (H.R. 8713), making unlawful the knowing employment of aliens present in this country unlawfully, was only recently reported favorably to the House by the Judiciary Committee (H.R. Rep. No. 94–506, 94th Cong., 1st Sess. (1975)).

Enactment of legislation like that under consideration would obviously help lessen the enormous law enforcement burdens now borne by the Border Patrol. But there is no assurance that it would wholly eliminate the problem of unlawful entry or render unnecessary the Border Patrol's traffic checking operations. Legislation is not an *alternative* but an important *complement* to an effective law enforcement program. Neither, in the absence of the other, can reasonably be expected to bring the problem of illegal immigration wholly under control. And the fact that Congress is considering and could enact legislation imposing sanctions on the knowing employment of illegal immigrants does not deflate the present law enforcement need for authority to make brief stops and inquiries at traffic checkpoints.

The court of appeals' other legislative suggestions—that Congress abolish the alien commuter system (see *Saxbe* v. *Bustos,* 419 U.S. 65) and eliminate temporary visitor permits—would have little impact on the Border Patrol's law enforcement problems. Only a

relatively small proportion of the deportable aliens apprehended by the Border Patrol enter this country lawfully and then violate the terms of their entry. In Fiscal Year 1975, according to figures furnished to us by the Immigration and Naturalization Service, more than 96 percent of the deportable aliens apprehended by the Border Patrol had entered this country surreptitiously without presenting themselves for inspection at a port of entry, and nearly 99 percent of those who entered without inspection were Mexican nationals.[9]

The inescapable conclusion is that there is no reasonably practicable alternative to a Border Patrol law enforcement program that includes as an essential element the stop and inquiry procedure at traffic checkpoints that was followed in this case.

2. A brief stop and inquiry at a fixed traffic checkpoint is significantly less intrusive than either a search for aliens at a checkpoint or a stop and inquiry by a roving patrol

The brief stop of a vehicle at a fixed traffic checkpoint to ask its occupants about their citizenship and right to be in the United States, while perhaps not trivial, can fairly be characterized as a "minimal intrusion" (*United States* v. *Brignoni-Ponce, supra,* slip op. 8) resulting in no more than a slight "interference with individual liberty" (*id.* at 6). The Immigration and Naturalization Service informs us that a stop for questioning at a checkpoint ordinarily takes

[9] The Service-wide figures, including apprehensions by all elements of the Immigration and Naturalization Service, are 87 percent and 98 percent, respectively.

no more than about five seconds per occupant. Such stops involve no search unless the officers have probable cause to believe that the vehicle contains concealed aliens or contraband (or unless consent is given for a search). All that is ordinarily required of the occupants is a response to a brief question or two and possibly the production of a document (see 8 U.S.C. 1304(e)) evidencing a right to be in the United States.

The checkpoint stop and inquiry procedure obviously does not entail the kind of intrusion into protected Fourth Amendment interests that was involved in even the limited checkpoint search for aliens conducted in *Ortiz,* a search that this Court characterized as "a substantial invasion of privacy" (slip op. 5). As the Court noted in *Ortiz,* a stop "is considerably less intrusive than a search" (slip op. 4).

We submit, moreover, that a checkpoint stop is significantly less intrusive than a roving patrol stop, and that the balance of reasonableness struck by the Court in *Brignoni-Ponce* should accordingly shift in the present case. We made a similar argument in *Ortiz* in an effort to distinguish checkpoint searches from roving patrol searches, and the Court's summary of our contention there fairly states our position here (slip op. 4):

> [T]he circumstances surrounding a checkpoint stop * * * are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can

598-506—75——5

see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.

Although the Court was not persuaded by our argument in *Ortiz,* it agreed that "[t]hese differences are relevant to the constitutional issue, since the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials" (*ibid.*). The Court concluded that the distinctions between a roving patrol stop and a checkpoint stop did not significantly differentiate the intrusiveness of the subsequent *search,* which in either situation amounted to "a substantial invasion of privacy" (*id.* at 5).

The Court acknowledged, however, that "the differences between a roving patrol and a checkpoint *would* be significant in determining the propriety of the stop" (*id.* at 4; emphasis added), and it accordingly left open the question "whether checkpoints and roving patrols must be treated the same for all purposes, or whether Border Patrol officers may lawfully stop motorists for questioning at an established checkpoint without reason to believe that a particular vehicle is carrying aliens" (*id.* at 6, n. 3).

Thus, the Court has already recognized that checkpoint stops may be significantly less intrusive than roving patrol stops. In our view, that difference is controlling, particularly when taken together with the increased governmental need for authority to conduct a checkpoint stop and inquiry procedure. While "[t]he greater regularity attending the stop does not mitigate the invasion of privacy that a search entails" (*id.* at 4), it does substantially reduce the potentially frightening and annoying aspects of a roving patrol stop (see Mr. Justice Rehnquist's concurring opinion in *Ortiz*). And, if "checkpoint procedures [do not] significantly reduce the likelihood of embarrassment" for "[m]otorists whose cars are searched," those procedures do minimize any potential embarrassment, we submit, for "those who are only questioned" (*Ortiz,* slip op. 5).

The court of appeals in this case invoked the language of this Court's opinion in *Carroll* v. *United States,* 267 U.S. 132, 154, that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search" (see Pet. App. 34a). In *Carroll,* however, the Court was considering "under what circumstances [a] search [for contraband] may be made" (267 U.S. at 153). There is no search involved here, and the quoted language should not be extrapolated beyond the context in which it was used.

It is undeniable that motorists stopped for inquiry at a checkpoint are subjected to a brief "interruption" in their use of the highway. But that interruption is not significantly more intrusive than the interruption caused by a traffic light or a stop sign. Unlike the situation in a roving patrol stop, motorists are not pursued by a patrol car with flashing lights and siren. No officer conducts a search of the vehicle. The total time consumed by the interruption is ordinarily less than a minute.

Although traffic lights and stop signs are erected to serve highway safety rather than immigration law enforcement objectives, the different purposes do not affect the intrusiveness of the interruption. And, while law enforcement officers do not normally address questions to motorists stopped at a traffic light, Border Patrol officers at a checkpoint make only the briefest inquiry concerning the occupants' citizenship and immigration status. Except where suspicious circumstances require a more elaborate explanation, no one is detained more than momentarily and no one is subjected to extended interrogation. We doubt that the usual five-second inquiry addressed to a motorist or his passengers so alters the nature of the "interruption" as to transform an otherwise trifling pause into a constitutionally prohibited invasion of privacy.

The Court in *Ortiz* was "not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search," and it concluded that "[t]his degree of discretion to search private automobiles is not consistent with the Fourth Amendment" (slip op. 5). Although at some checkpoints, such as San Clemente, where the volume of traffic precludes the stopping of every vehicle, the officers exercise a similar degree of discretion in selecting cars for a stop and inquiry, there is nothing inherently improper about law enforcement discretion. What the Court found unacceptable in *Ortiz* was the officers' "discretion to search." No such discretion is exercised or claimed here (except, of course, where there is probable cause or consent).

Similarly, while the Court in *Brignoni-Ponce* concluded that giving roving patrol officers "broad and unlimited discretion" (slip op. 9) to make stops would be inconsistent with the reasonableness requirement of the Fourth Amendment, the kind of discretion that concerned the Court there is not involved here. An officer at a checkpoint has no discretion to "stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road" (*ibid.*). The basic decisions regarding the location of a checkpoint, its hours of operation, and the traffic checking procedures to be followed are made by relatively high-ranking officials of the Border Patrol, taking into account "the degree of inconvenience to the public and the potential for safe operation, as well as the potential for detecting and deterring the illegal movement of aliens" (*Ortiz,* slip op. 4). See *United States* v. *Baca, supra,* 368 F. Supp. at 406.

Thus, while a checkpoint officer necessarily retains discretion to select certain vehicles for a stop and inquiry, he has no roving mandate to stop all vehicles anywhere in the border area. His responsibility is limited to a fixed location, strategically selected to minimize the interference with lawful traffic. And, as we have stated, his decision to stop an approaching vehicle occasions a significantly lesser intrusion than may result when a roving patrol officer, cruising in a patrol car, decides to pursue a vehicle and direct it to the side of the road.

B. THE REASONABLENESS OF THE CHECKPOINT STOP AND INQUIRY PROCEDURE DOES NOT DEPEND UPON PRIOR JUDICIAL APPROVAL THROUGH A WARRANT PROCEDURE

Although the central inquiry here is whether the stop and inquiry procedure at traffic checkpoints is reasonable under the Fourth Amendment, we recognize that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause" (*United States* v. *United States District Court,* 407 U.S. 297, 315) and therefore that "a prior judicial judgment" (*id.* at 317) concerning the justification for operating a particular checkpoint may affect the reasonableness of the operation. The stop and inquiry procedure involved in the present case was in fact authorized in advance by a federal magistrate,[10] and we argue in the next section of this brief that the resulting warrant was properly issued and that the advance judicial approval it reflects contributes to the reasonableness of the law enforcement measures it authorized.

The court of appeals, however, concluded that the warrant was constitutionally invalid (Pet. App. 16a–32a). While we contend that the court's analysis was faulty, this Court need not reach that question if, as we here argue, the checkpoint stop and inquiry procedure was reasonable regardless of the warrant.

We think our preceding discussion demonstrates that the minimal intrusions occasioned by checkpoint

[10] On November 11, 1975, this Court granted certiorari in *Sifuentes* v. *United States*, No. 75–5387, and ordered that it be set for argument in tandem with the present case. *Sifuentes* also involves a checkpoint stop and inquiry, but the operation there had not been authorized in advance by a judicial officer.

stops are justified by a compelling law enforcement need. We submit that the additional assurance of reasonableness that a warrant might provide is unnecessary in the context of checkpoint stops and that, because of significant practical problems, a warrant requirement might frustrate the law enforcement objectives served by the traffic checkpoints.

1. *Advance judicial approval is unnecessary*

a. The "seizure" involved in the stopping of an automobile at a checkpoint and the brief questioning of its occupants is so limited an intrusion into the privacy interests protected by the Fourth Amendment that the interposition of a magistrate is unnecessary to ensure its reasonableness. Just as the nature of the cause necessary to justify a particular search or seizure depends in part upon the extent of the intrusion contemplated (*Terry* v. *Ohio,* 392 U.S. 1, 17–18, n. 15; *United States* v. *Brignoni-Ponce, supra,* slip op. 6–7), so should the need for a warrant turn in part upon the scope of the official interference with protected interests.

For example, "broad and unsuspected governmental incursions into conversational privacy [through] electronic surveillance" may "jeopard[ize] * * * constitutionally protected speech" and, particularly when directed against "those suspected of unorthodoxy in their political beliefs," may make "Fourth Amendment protections * * * the more necessary" (*United States* v. *United States District Court, supra,* 407 U.S. at 313–314). The magnitude of "the potential danger posed by

unreasonable surveillance to individual privacy and free expression" (*id.* at 315) heightens the "risk" involved in relying solely on "unreviewed executive discretion" as a guarantee of reasonableness (*id.* at 317). In those circumstances, this Court concluded that "the needs of citizens for privacy and free expression may * * * be better protected by requiring a warrant before such surveillance is undertaken" (*id.* at 315).

When law enforcement officers use less "constitutionally sensitive means in pursuing their tasks" (*id.* at 317), however, a warrant may not always be required. In *Cardwell* v. *Lewis,* 417 U.S. 583, 589, for example, four members of this Court concluded that the scraping of paint from the exterior of an automobile did not "invade * * * a right to privacy which the interposition of a warrant requirement is meant to protect." And in *Brignoni-Ponce,* where the Court concluded that suspicious vehicles could be stopped by roving patrol officers in the Mexican border area, there was no suggestion that prior judicial approval of a roving patrol operation would be required.

The brief stop and verbal exchange involved in the checkpoint practices at issue here do not, in our view, present the sort of dangers that a warrant is ordinarily designed to protect against. Unlike routine roving patrol searches, which Mr. Justice Powell thought could be justified only if advance judicial approval were obtained (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 279–285, concurring opinion), checkpoint stops involve no "substantial invasion of privacy" (*United States* v. *Ortiz, supra,* slip

op. 5). Indeed, as we have shown, a checkpoint stop is even less intrusive—and therefore less "constitutionally sensitive" (*United States* v. *United States District Court, supra,* 407 U.S. at 317)—than the roving patrol stop in *Brignoni-Ponce.* We believe that the need for advance judicial approval is correspondingly reduced.

b. Moreover, because a checkpoint is stationary and its routine operation is consistent from day to day and even from year to year, there is little need for periodic *ex parte* judicial approval in *advance* of its operation during a particular week or month. The reasonableness of the checkpoint's operation can effectively be adjudicated for the first time in an adversary criminal proceeding, and, once the court has determined that the operation of a particular checkpoint is reasonable, that reasonableness would not be substantially enhanced by repeated approvals in advance of subsequent periods of operation.

By the same token, if the court determined in the context of a motion to suppress that the operation of a particular checkpoint was unreasonable, that determination, unlike a refusal to issue a warrant, would be subject to appellate review under 18 U.S.C. 3731.

We recognize that the determination whether to conduct a checkpoint operation "involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights" and therefore could be said to present "the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive" (*Almeida-*

Sanchez v. *United States, supra,* 413 U.S. at 284, Mr. Justice Powell concurring). In view of the special characteristics of fixed checkpoints, however, that judicial determination, once made for a particular checkpoint in the context of a motion to suppress, serves the same function that would be served in other circumstances by a warrant.

Since the reasonableness of the operation as a whole is the principal issue with respect to a checkpoint, and since the operation is ordinarily subject to no variation in terms of location and little if any in terms of operating procedure, an initial judicial determination that a particular checkpoint stop and inquiry was reasonable can and should suffice to validate the future similar operation of the checkpoint as well.[11]

That is not to say that an aggrieved person may not thereafter allege and prove in a particular factual setting that the stop of his automobile was unlawful or that the checkpoint's operation is unreasonable. We submit, however, that the Fourth Amendment values at stake are adequately protected when those claims are adjudicated *after* a checkpoint search has been conducted and in the context of an adversary proceeding on specific facts. To require frequent, periodic, *ex parte* presentations by the government to justify continuation of a checkpoint's operation would spend valuable judicial and administrative resources to achieve no important Fourth Amendment purpose.

[11] Indeed, the district court's opinion in *Baca* amounts to a determination that the checkpoints in the southern California area are reasonably located and reasonably operated in light of the public interest involved and the nature and extent of the intrusions contemplated.

2. A warrant procedure for checkpoints may frustrate legitimate law enforcement objectives

The Border Patrol operates 17 permanent and 30 temporary checkpoints in California, Arizona, New Mexico, and Texas, within the jurisdiction of six different federal judicial districts.[12] Though spread over the entire southwest border region, the checkpoints form a cohesive network in which each is coordinated with others in the same vicinity. The deterrent effectiveness of the entire network depends upon that coordination.

As the district court found in *Baca,* "[t]he placement of the checkpoints and their operations are coordinated between the two sectors located in this district and with Border Patrol activities to the east in Arizona" (368 F. Supp. at 407). Consequently, "the checkpoints in the Southern District ought to be conceptualized as parts of a systemic, integrated whole in which each part is, to some extent, interdependent upon the functioning of the other parts" (*id.* at 417).

In the Chula Vista Sector in California, for example, where "[t]he San Clemente checkpoint is the cornerstone of the checkpoint system" (*id.* at 415), its location determines the location of the others, because "each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass

[12] Central District of California, Southern District of California, District of Arizona, District of New Mexico, Western District of Texas, Southern District of Texas.

roads" (*id.* at 416). Thus, "[t]he checkpoints in the Chula Vista Sector reenforce each other and each prevents the circumvention of any other checkpoint; they are a system and one cannot be tampered [with] without affecting the positioning of the others" (*ibid.*).

The interrelationship of the Border Patrol's 47 checkpoints makes it difficult to structure a workable warrant procedure. For a court to review the basic agency decision to operate a particular checkpoint would require consideration of information relating not only to the checkpoint in question but also to other checkpoints in the same sector[13] as well as checkpoints in neighboring sectors. Denial of a warrant for a particular checkpoint could seriously reduce the deterrent effectiveness of the entire system, and it may not always be possible to obtain prompt judicial approval of revised plans to compensate for the absence of a particular checkpoint.

Even if it would be feasible to seek warrants for all the checkpoints in a judicial district at one time—that is, to make periodic *ex parte* presentations of information such as that presented in an adversary context in the consolidated proceeding in *Baca*—the magistrate or judge presumably could not issue warrants for any coordinate checkpoints located outside his judicial district (Rule 41(a), Fed. R. Crim. P.). The relationship between the checkpoints, however, does not end at the district boundary. If the magis-

[13] There are nine Border Patrol "sectors" in the southwest region, each of which is headed by a Chief Patrol Agent.

trates in neighboring districts should take different views of the information presented to them, the coordination of the system, and its deterrent effectiveness as a whole, could be seriously disrupted. That risk of disruption would, of course, increase geometrically to the extent that warrants for each checkpoint must be justified and obtained separately from a variety of issuing magistrates.

There is another practical problem. To maximize the effectiveness of the Border Patrol's overall traffic checking operations, experience has shown that the Chief Patrol Agent in each sector must retain flexibility in operating the various checkpoints within his jurisdiction. It is not always possible to anticipate when law enforcement strategy will require the operation of a particular checkpoint.

At times, specific information about expected smuggling activity, changed weather or manpower conditions, or perhaps just the seasoned judgment of an experienced patrol agent will indicate, for example, that a regular checkpoint should be shut down for an afternoon and an infrequently used temporary checkpoint be placed in operation. But the need may not arise frequently enough or with sufficient predictability to justify seeking a warrant for it during any particular week. The effect of a warrant requirement in circumstances like these could be to confine the Border Patrol's enforcement efforts to those checkpoints operated regularly and thereby to diminish the effectiveness of the traffic checking operations as a whole. To that extent, it would "frustrate the govern-

mental purpose'' behind that program (*Camara* v. *Municipal Court*, 387 U.S. 523, 533).

II

IF ADVANCE JUDICIAL APPROVAL IS NEEDED TO ENSURE THE REASONABLENESS OF A CHECKPOINT STOP AND INQUIRY PROCEDURE, THE WARRANT HERE SATISFIED THAT NEED

In his concurring opinion in *Almeida-Sanchez*, Mr. Justice Powell suggested that it would be possible to "reconcil[e] the obvious needs of law enforcement with relevant constitutional rights" (413 U.S. at 277) by requiring, in the case of routine roving patrol searches, that the government "obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time" (*id.* at 283). That advance approval, in Mr. Justice Powell's view, could be reflected in a warrant issued by a judge or magistrate on the basis of "supporting information relat[ing] to criminal activity in certain areas rather than to evidence about a particular automobile" (*id.* at 281–282).

Recognizing that "it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country" (*id.* at 276), Mr. Justice Powell reasoned that "on appropriate facts the Government can satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles" (*id.* at 281). While the focus of the resulting warrant obviously would be "'less precise than that directed against

more conventional types of crime,'" "the novelty of the problem posed by roving searches in border areas" required, in Mr. Justice Powell's view, an unconventional solution: "'[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government . . . and the protected rights of our citizens'" (*id.* at 284–285, quoting from *United States* v. *United States District Court, supra*, 407 U.S. at 322–323).

The four dissenting Justices in *Almeida-Sanchez*, while disagreeing with Mr. Justice Powell over the need for an area-type search warrant, agreed with his view that "such a warrant so issued would satisfy the Fourth Amendment" (413 U.S. at 288).

The warrant in the present case (A. 52–53) is the type envisioned by Mr. Justice Powell and the four dissenting Justices in *Almeida-Sanchez*, with two important exceptions. It authorized Border Patrol officers to stop vehicles and make limited inquiries of the occupants, not to search the vehicles for aliens,[14] and it permitted such operations to be conducted, not on several roads in an "area," but at a specified loca-

[14] Although the warrant authorized the officers "to conduct a routine inspection of said vehicles for the presence of aliens" (A. 53), it was not clear whether "inspection" was intended to imply "search," and in any event the Border Patrol did not conduct routine searches of the interior of vehicles. Such searches, under the warrant in this case and under other warrants issued thereafter for the San Clemente checkpoint, were conducted only on the basis of probable cause or consent. The court of appeals accordingly stated that it was "not directly concerned" in this case with the "inspection" authority conferred by paragraph (3) of the warrant, and it did "not consider any argument that the warrant is invalid because paragraph (3) is too broadly drawn" (Pet. App. 7a–8a, n. 3). As the court noted, "later renewals of the warrant

tion—the fixed traffic checkpoint near San Clemente, California.

We have already argued that the stops in this case were reasonable without regard to the warrant. We argue here that the advance judicial approval reflected in the warrant sufficiently enhances the reasonableness of the law enforcement conduct it authorized to remove any residual doubt regarding the propriety of the stops, and that the warrant represents a proper "balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights" (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 284, Mr. Justice Powell concurring).

A. THE WARRANT IS COMPATIBLE WITH THE FOURTH AMENDMENT, AND IT ENHANCES THE REASONABLENESS OF THE STOP AND INQUIRY PROCEDURE AT THE CHECKPOINT

In assessing the validity of the stops in this case, the court of appeals gave no weight to the existence of the warrant, because, in its view, "the concept of an area warrant [in other than administrative inspection cases] * * * is contrary to certain fundamental

---

deleted the authority to 'inspect' and limited agents to the stop and inquiry procedure" (*ibid.*).

The officers who stopped respondent Guillen's vehicle searched the trunk and found three aliens concealed inside it. That search, however, was conducted only after the officers had first discovered two illegal aliens in the passenger compartment. The search of the vehicle's trunk therefore rests upon traditional probable cause and is not separately in issue here. The court of appeals assumed for purposes of its decision that the "discovery [of the aliens in the passenger area] gave probable cause to search the trunk" (Pet. App. 7a, n. 3). The court found it unnecessary to decide the issue, "because the parties rest their cases on the validity vel non of the stop made under the inspection warrant" (*id.* at 4a, n. 1).

precepts of the Fourth Amendment" (Pet. App. 24a). The warrant was invalid, the court found, because it was not issued on the basis of "probable cause—or even founded suspicion—focused on any particular person or vehicle" (*id.* at 32a), and because it did not describe with sufficient particularity the persons or things to be seized (see *ibid.*).

We submit that the prior judicial approval of the San Clemente stop and inquiry procedure is entitled to substantial weight in determining the reasonableness of the stops in this case. That is so, we believe, even if, contrary to the stated views of the five Justices in *Almeida-Sanchez,* the checkpoint warrant is incompatible with the terms of the Fourth Amendment's warrant clause.

1. Although the warrant was not issued on the basis of probable cause focused on any particular person or vehicle, the affidavits and other information supporting the government's application satisfied the magistrate that there was "probable cause to believe that mass violations of the Immigration laws * * * have been and are being committed" at the location of the San Clemente checkpoint (A. 52).

For the reasons stated in Mr. Justice Powell's concurring opinion in *Almeida-Sanchez,* that finding satisfied the probable cause requirement of the Fourth Amendment, in light of the unique immigration law enforcement problems faced by the Border Patrol in the Mexican border area. The situation here is analogous to that in *Camara* v. *Municipal Court,* 387 U.S. 523. The Border Patrol's decision to conduct a stop and inquiry procedure at a traffic checkpoint,

like the agency's decision to conduct area-wide housing inspections in *Camara,* "is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular [vehicle]" (387 U.S. at 536).

The court of appeals reasoned that *Camara* is distinguishable from this case "in just two crucial respects" (Pet. App. 25a). First, whereas the periodic building inspections in *Camara* were "the only way to discover certain dilapidations that violated the housing codes, * * * the influx of illegal aliens could conceivably be stemmed in various ways" other than stopping vehicles at checkpoints (*ibid.*). Second, "the inspection[s] authorized in *Camara* were not in the nature of a criminal investigation" (*id.* at 27a), whereas "[t]he checkpoints perform primarily crime-investigative rather than administrative functions" (*id.* at 29a).

Neither of these asserted distinctions is persuasive. As Mr. Justice Powell and the dissenting Justices in *Almeida-Sanchez* recognized (413 U.S. at 278, 279, 293), and as we have argued here (pp. 26–28, *supra*), there is no reasonably practicable alternative to the Border Patrol's traffic checking procedures. Moreover, although the illegal entry and transportation of aliens may involve several criminal offenses,[15] the Border

[15] *E.g.*, 8 U.S.C. 1324 (harboring, transporting, inducing illegal entry); 8 U.S.C. 1325 (illegal entry); 8 U.S.C. 1326 (reentry of deported or excluded alien); 18 U.S.C. 911 (false representation as citizen); 18 U.S.C. 1546 (misuse of visas, permits, and other entry documents). See generally 2 Gordon and Rosenfield, *Immigration Law and Procedure*, §§ 9.22–9.40 (1975).

Patrol's primary mission has always been to prevent unlawful entries and to apprehend illegal entrants for deportation. "Of the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted, unless they presented counterfeit or altered documents or aided in smuggling endeavors" (*United States* v. *Baca, supra,* 368 F. Supp. at 408). As Mr. Justice Powell stated, "[t]he possibility of prosecution does not distinguish [roving patrol] searches from those involved in *Camara*"; "violators of the housing code there were [similarly] subject to criminal penalties" (413 U.S. at 278–279). See *Camara* v. *Municipal Court, supra,* 387 U.S. at 527, n. 2.

It is true that a *Camara*-type warrant, "normally * * * sought only after entry is refused," ordinarily "specif[ies] the property to be searched" (387 U.S. at 539), whereas the warrant here authorized the stopping of any northbound vehicle at the San Clemente checkpoint. It is equally true, however, that, "while a building inspector who is refused admission to a building may easily obtain a warrant to search that building, a member of the Border Patrol has no such opportunity when he is refused permission to inspect an automobile" (*Almeida-Sanchez* v. *United States,* 413 U.S. at 282–283, Mr. Justice Powell concurring). If there is to be any advance judicial approval, it must relate to the basic agency decision to operate a particular checkpoint.

The focus of a warrant authorizing checkpoint stops is therefore unavoidably "less precise than that di-

rected against more conventional types of crime" (*United States* v. *United States District Court, supra,* 407 U.S. at 322). In these unique circumstances, the warrant is sufficiently precise if it identifies the place at which the stops are to be made, the permissible purpose and scope of the authorized intrusion, and (with all the particularity that the situation permits) the class of vehicles that may be stopped. The warrant in this case was adequate under that standard.

Five Justices have already expressed the view that a warrant authorizing routine roving patrol searches of all cars in a prescribed area can properly issue on the basis of area-type probable cause. If so, the warrant here, authorizing a far less substantial invasion limited to a particular fixed location rather than an area encompassing several roads, is *a fortiori* valid.

2. Even if a warrant authorizing checkpoint stops could not be brought within the traditional requirements of a search warrant, that would not diminish the significance of the prior judicial approval in determining the validity of the stops in this case. As we have stated (pp. 16–17, *supra*), the proper analysis here involves application of the reasonableness standard of the Fourth Amendment, and the question is whether, in light of the advance judicial approval of the checkpoint operations, the investigative stops in this case were reasonable.

Even if the magistrate's approval cannot properly be labeled a "warrant," it satisfies the concern expressed in Mr. Justice Powell's concurring opinion in *Almeida-Sanchez*. What is important in this case is

that the "delicate question of constitutional judgment" involved in "a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights" was here "resolved by the Judiciary rather than the Executive" (413 U.S. at 284). It is not the warrant itself that assures the reasonableness of an official intrusion; it is the "prior judicial judgment" (*United States* v. *United States District Court, supra,* 407 U.S. at 317) evidenced by the warrant. Accordingly, even if checkpoint stops would be unreasonable without advance approval by a detached and neutral magistrate, no such defect invalidates the stops in this case.

B. THE MAGISTRATE CORRECTLY DETERMINED THAT THE STOP AND INQUIRY PROCEDURE AT THE SAN CLEMENTE CHECKPOINT WOULD BE REASONABLE IN LIGHT OF THE GOVERNMENTAL NEED AND THE LIMITED SCOPE OF THE INTRUSION CONTEMPLATED

1. The San Clemente checkpoint, located on Interstate Route 5 about 62 air miles and 66 road miles from the Mexican border, "is the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (*United States* v. *Baca, supra,* 368 F. Supp. at 410). Deputy Chief Patrol Agent Batchelor testified in the *Baca* hearing (*Baca* Tr. 148):

> Our primary checkpoint is here at San Clemente. This is the crucial one, the critical one. * * * Rather than trying to circumvent that checkpoint, [the alien smugglers] would rather wait until it is broken down, because it is such a straight shot in. That is where we try to hold as firm as we can.

Together with the other checkpoints in the area, San Clemente forms a strategic network in which "each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass roads" (*Baca, supra,* 368 F. Supp. at 416).

The San Clemente checkpoint is placed where "the volume of traffic is the lowest of any point on Route 5 between San Diego and Los Angeles" (*id.* at 411). "While there is a great deal of commuter traffic south of Oceanside, the traffic at the Interstate 5 checkpoint is predominantly inter-city with few commuter vehicles passing through" (*ibid.*). "Bounded on the east by Camp Pendleton and on the west by the Pacific Ocean, the checkpoint straddles a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north" (*id.* at 415).[16]

[16] The district court in *Baca* described the appearance of the checkpoint as follows (368 F. Supp. at 410–411):

"Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating 'All vehicles, Stop Ahead, 1 Mile.' Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating 'Watch For Brake Lights.' At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state 'Stop Here—U.S. Officers'. Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red 'Stop' sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation."

Traffic checking operations at San Clemente are very productive. An affidavit supporting the warrant application stated that nearly 17,000 aliens were apprehended at the checkpoint in calendar year 1973 (A. 46). That figure, though significant, is not by itself a full measure of the effectiveness of the checkpoint, for its principal purpose is to *deter* illegal entry (see *Baca,* 368 F. Supp. at 407). The credibility of a deterrent cannot be assessed solely by reference to the number of violators apprehended; the more effective it is, the less productive it is likely to be.

The Border Patrol's experience in operating the San Clemente checkpoint unexpectedly [17] or over unusually

[17] Some smugglers know that the heavy volume of traffic on Interstate Route 5 on Sunday afternoons usually makes it impractical to operate the San Clemente checkpoint at that time. On one such Sunday afternoon, however, additional manpower was deployed at San Clemente, and the checkpoint was kept open. As Agent Batchelor testified, the results were impressive (*Baca* Tr. 156):

"We made—seized twenty-one smuggling vehicles with loads at the checkpoint. They just blundered on in, and we had another twenty some odd vehicles abandoned south of the checkpoint. * * * Two days later, we were still rounding up aliens in Camp Pendleton that had left these vehicles and gone into Camp Pendleton."

A total of more than 300 illegal entrants were apprehended as a consequence of the Sunday operation (*id.* at 158).

Similar results were obtained when the San Clemente checkpoint was closed down for a short period and then opened again (*id.* at 408). Scouts had notified smugglers that it was safe to proceed north on Interstate Route 5, but the checking was resumed while they were en route, and the drivers "had no way of knowing that [the checkpoint] was put up until they reached it" (*ibid.*).

long periods [18] demonstrates that it acts as a powerful deterrent to the inland transportation of illegal entrants. As Judge Carter stated in his dissenting opinion in this case, while many thousands of deportable aliens are apprehended at San Clemente, "the number *deterred* is inestimable" (Pet. App. 41a; emphasis in original).

The operating procedure at San Clemente is unlike that of other checkpoints (see 368 F. Supp. at 406–407, 411). A "point" officer stands on the highway observing approaching vehicles and their occupants. If he determines that a stop and inquiry would be appropriate, he directs the vehicle to a secondary area at the side of the highway, where another officer asks the occupants about their citizenship and immigration status.[19]

[18] Checkpoints cannot ordinarily be operated around-the-clock. On one occasion, however, the San Clemente checkpoint was operated continuously for five days, and smugglers were unable to transport illegal entrants on Route 5. When the "drop houses" began to overflow, some smugglers attempted to take a different, unfamiliar route and found themselves unexpectedly at the coordinate California checkpoint at Oak Grove. "[T]here were seven loads that they sent through Oak Grove and five of those loads were caught at the checkpoint" (*Baca* Tr. 409).

[19] At most checkpoints, traffic is much lighter than at San Clemente, and the stop and inquiry is conducted by the point officer himself. Vehicles are referred to a secondary inspection area only when suspicious circumstances warrant further questioning of the occupants or a physical inspection of the vehicle. See *United States* v. *Baca*, *supra*, 368 F. Supp. at 406–407, 411–414. For descriptions of two Border Patrol checkpoints in Texas, see *United States* v. *Hart*, 506 F. 2d 887, 896 (C.A. 5), vacated and remanded, June 30, 1975, No. 74-6014, and *United States* v. *Fuentes*, 379 F. Supp. 1145, 1147 (S.D. Tex.), affirmed, 517 F. 2d 1401 (C.A. 5).

Although many vehicles pass through the checkpoint during its hours of operation,[20] it was estimated at the time of the *Baca* hearing that only three percent were stopped and directed to the secondary area (368 F. Supp. at 411). Statistics compiled subsequently indicate that the figure is less than one-half of one percent (see Pet. App. 63a). Even though vehicles that are stopped must leave the highway and enter the secondary area, the average time consumed by a stop for questioning at San Clemente is still only three to five minutes (A. 46).

Thus, not only is the San Clemente checkpoint an integral and effective part of the network of checkpoints in the southern California area, but also it is located and operated in a manner reasonably designed to minimize disruption of and inconvenience to the innocent traveling public. The magistrate's determination that a warrant should properly issue to authorize a stop and inquiry procedure at the checkpoint was amply supported by the affidavits before him, together with the evidence and findings in *Baca*.

The determination that there was "probable cause to believe that mass violations of the Immigration laws" were being committed at the location of the checkpoint (A. 52) was borne out by statistics submitted in the return on the warrant (A. 54). They showed that, during the ten-day period covered by the warrant, the checkpoint was operated for about 124 hours, during which 145,960 vehicles passed through

[20] The checkpoint is operated around-the-clock except in times of heavy traffic, adverse weather conditions, or manpower shortages (A. 47; 368 F. Supp. at 411, 415).

the checkpoint. Only 820 of those vehicles (or about one-half of one percent) were stopped for questioning, and 725 deportable aliens were found in 171 (or about 21 percent) of the vehicles stopped.

2. The court of appeals, however, concluded that the government's showing was not sufficient to justify issuance of the warrant (Pet App. 33a–35a). The reasons given by the court do not support its conclusion.

The court stated that "the frequency with which illegal aliens pass through the San Clemente checkpoint is far too low," because "only 0.12 percent of the passing cars were found to contain 'illegal' aliens" (*id.* at 33a). That figure was computed by dividing the number of vehicles in which aliens were found by the total number that passed the checkpoint (more than 99 percent of which were not stopped for questioning).

The resulting percentage does not meaningfully reflect "the frequency with which aliens illegally in the country are known or reasonably believed to be transported" in the area (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 283, Mr. Justice Powell concurring), because there is no assurance that every vehicle containing illegal entrants was successfully stopped by the officers at the checkpoint. It is reasonable to suppose that, of the many thousands of vehicles not stopped at the checkpoint, a significant proportion (presumably less than the 21 percent figure) in fact contained aliens who successfully evaded detection.

The Border Patrol has never claimed that it has the capacity to detect and apprehend, through a stop and inquiry procedure, every deportable alien who passes a checkpoint. Its objective is to deter the illegal entry

and transportation of aliens by subjecting each (and those who unlawfully transport them) to a significant risk of apprehension through traffic checking procedures. Statistics at San Clemente demonstrate that the operation is reasonably successful but obviously not impenetrable. They also confirm the magistrate's finding that an enormous number of violators pass through the checkpoint. The court of appeals' arithmetic does not contradict or in any way undermine that finding.

The court of appeals also concluded that "66 miles is too far away" from the border (Pet. App. 33a) and that the checkpoint lacks "an essential nexus with the border" (*id.* at 34a). As the record in *Baca* demonstrates, however, geographic considerations and the fraudulent use of border-crossing identification cards make it necessary to place most checkpoints, including the San Clemente checkpoint, at least 25 miles from the border (*e.g., Baca* Tr. 32–33, 115, 166–167, 353; 368 F. Supp. at 406)[21].

Professional smugglers commonly furnish their illegal entrants with illicit border-crossing cards by which to enter at a regular port of entry (see *Baca* Tr. 404–405). Since those cards authorize the holder to travel up to 25 miles from the border, a checkpoint placed within that range would be ineffective in

[21] Under 8 C.F.R. 212.6, a Mexican nonresident alien may enter this country as a nonimmigrant visitor pursuant to a border-crossing card, Form I-186, which authorizes the holder to spend a maximum of 72 hours in the United States. The visit must be confined, however, to the "immediate border area," which is defined by the regulation as "within a distance of 25 miles from the Mexican border."

deterring the inland movement of the illegal entrant. Documentation authorizing travel beyond the 25-mile limit, however, is far more difficult for a smuggler to obtain (*id.* at 420–421).

As Chief Patrol Agent Felchlin testified, "[s]trategically, the traffic check operations are located at the first possible location where we can effectively control the traffic" (*id.* at 353).

Moreover, the immediate border area to the south of the San Clemente checkpoint is unsuitable for traffic control operations because there are too many roads to cover effectively and because such operations would disrupt commuter and shopper traffic. Agent Batchelor testified that if checkpoints in the Chula Vista sector were placed within a mile or two from the border, "it would be havoc" (*id.* at 162). "The normal business of this metropolitan area here [San Diego] could not be conducted" (*ibid.*). Even if checkpoints were placed five miles from the border in that area, it would require twelve stations to do the job accomplished now by three and would still require the checking of far more traffic, including "bumper to bumper" commuter traffic, than is checked at existing stations (*id.* at 162–163). The San Clemente checkpoint is located at a portion of Interstate Route 5 that carries few commuter vehicles, and where the volume of traffic is the lowest of any point between Los Angeles and San Diego (368 F. Supp. at 411).

Natural geographic barriers "act to funnel all northerly traffic" (*id.* at 410) along routes where the Border Patrol operates its three principal checkpoints

in the Chula Vista sector of southern California. The majority of the traffic follows Interstate 5 and passes through the San Clemente checkpoint, which is bounded by a narrow strip of land dropping off to the Pacific Ocean on the west and Camp Pendleton on the east. The checkpoint thus "straddles a natural corridor along which illegal aliens frequently travel" (*id.* at 415).

Thus, while the checkpoint is 66 miles from the border, its location is dictated by geographic and strategic considerations. It is as close to the border as feasible in light of those considerations. The checkpoint's distance from the border, though relevant, is not, in these circumstances, of controlling significance in determining the reasonableness of its operation.

Finally, the court of appeals stated that the "degree of interference with the rights of innocent persons at the checkpoint is intolerable," because "[r]oughly 999 out of every 1000 cars passing the checkpoint carry only persons who are lawfully within the country" (Pet. App. 34a). "We cannot countenance the cumulative intrusion of stopping ten million cars per year where only one out of every 1000 passing cars may contain aliens" (*id.* at 34a–35a).

The court's analysis rests upon erroneous premises. First, while 10 million vehicles may pass the checkpoint annually, less than half that number passes while the checkpoint is in operation.[22] Second, as we have

[22] During the nine-month period when the checkpoint was operating under warrants, approximately three million vehicles passed during its hours of operation (Pet. App. 63a).

already indicated (p. 54, *supra*), it is inaccurate to say that "only one out of every 1000 passing cars may contain aliens." Though it is impossible to estimate the number of vehicles containing aliens that successfully evade detection, the figure is undoubtedly substantial.

Third, the record here indicates that only about one-half of one percent of the passing vehicles are stopped for inquiry (A. 54). The rest are waved through the checkpoint, usually without stopping at all.[23] But even if most vehicles are brought to a momentary halt, the occupants are not questioned by the point officer, and the resulting "intrusion," if any there be, is of little constitutional significance. The Ninth Circuit itself has held that the mere "diversion of motor traffic into a zone where it can be observed by officers" does not infringe upon "any constitutionally protected expectation of privacy" (*United States* v. *Evans*, 507 F. 2d 879, 880, certiorari denied, June 30, 1975, No. 74-6055).

The pertinent inquiry, as Judge Carter stated in his dissenting opinion (Pet. App. 40a), is whether it is reasonable to stop *for questioning* a very small proportion of the passing vehicles, when about 20 percent of the vehicles stopped for questioning are found

[23] The evidence in *Baca* does not clearly indicate how many vehicles are brought to an initial stop (see *Baca* Tr. 184–185). The district court stated that "[t]he checkpoint entails for the average motorist nothing more than a fleeting stop" (368 F. Supp. at 415). As we stated in the oral argument in *Ortiz* (Tr. 25–26), the Border Patrol has informed us that, apart from those vehicles that are referred to the secondary area for questioning, very few come to a full stop (except when traffic is light and the driver is curious). The "point" officer waves the traffic through at about five miles an hour.

to contain deportable aliens. Given the important law enforcement interest served by that procedure, and the brief and limited intrusion it entails, we think it is plainly justified. To characterize the statistics as showing that "the border patrol was 'overzealous' by a factor of nearly five in diverting cars for secondary inspection" (Pet. App. 13a) is to acknowledge, in effect, that the stop and inquiry procedure under the warrant in this case was remarkably successful at only a minimal cost to innocent travelers.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded with directions to enter judgments affirming the conviction of respondent Martinez-Fuerte and remanding the other cases to the district court for further proceedings.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
SIDNEY M. GLAZER,
REUBEN H. WALLACE, JR.,
Attorneys.

DECEMBER 1975.

APPENDIX

In the United States District Court for the District of Arizona

CR–74–758–TUC WCE (Battin)

UNITED STATES OF AMERICA, PLAINTIFF
v.
CHARLES THOMAS OSBORNE, SR., DEFENDANT

ORDER

Presently pending in this action is the motion of the defendant to suppress any and all evidence seized as a result of the detention and arrest of defendant on November 11, 1974. Hearings were conducted on January 13 and January 20, 1975.

For the purposes of this motion only, the Court makes the following summary of facts surrounding the seizure of the evidence in question.

At approximately 11:45 o'clock a.m., November 11, 1974, Supervisory Customs Patrol Officer J. C. Padalino observed a 1969 white over red Ford Galaxie traveling north at Milepost 2, approximately two miles north of the United States-Mexico International Boundary. The defendant was the driver of the vehicle. Officer Padalino noticed that the car was riding low, despite the fact that it appeared to have heavy duty "air shocks".[1] The vehicle did not have a trailer

[1] The court concludes that the evidence introduced by defendant at the above hearings was insufficient to establish that the subject vehicle was not riding low on the day in question or that Officer Padalino could not on that day observe a portion of the heavy duty air shocks.

hitch. Padalino also observed what appeared to be fingerprint smudges on the vehicle's trunk.

Through a radio check, Padalino discovered that the vehicle was registered to Richard R. or M. E. Quiroz, of Kearny, Arizona. Kearny is some one hundred miles north of the International Boundary. Officer Padalino noted that the name "Quiroz" is of Mexican or Spanish origin, while the driver of the subject vehicle appeared to be of Anglo-American origin.

While awaiting the results of the registration check, Padalino observed that the defendant displayed numerous nervous characteristics. The vehicle, which was first observed traveling at approximately the posted speed limit of fifty-five miles per hour, slowed down to a speed of forty miles per hour. When Padalino followed the subject vehicle, the defendant repeatedly looked through his rear view mirror. His vehicle swerved on the roadway. When Padalino would drive his vehicle in the lane adjacent to the defendant's vehicle, the defendant would not look at Padalino or Padalino's marked Patrol vehicle. Padalino noted that the defendant sat very rigid in the driver's seat, maintaining a firm grip on the steering wheel with one hand, while moving his other hand nervously.

Because of these circumstances, Padalino stopped the defendant's vehicle at approximately Milepost 10 on Interstate 19. Both defendant and Padalino exited their vehicles and approached each other. Upon request, the defendant produced his driver's license showing that his name was Charles Thomas Osborne and that his address was 1254 South Craycroft, Tucson, Arizona. The defendant again projected indicia of nervousness by moving his arms and head in a noticeably fast fashion while talking with the officer.

The defendant said that he had not been in Mexico. He further indicated to Padalino that the vehicle belonged to a Robert Serrano of Nogales, Arizona, although the defendant said he did not have the vehicle's registration. The defendant said that he had been at a friend's house in Nogales, Arizona, and identified that friend as Robert Serrano. In response to further questioning, the defendant described the directions to the Serrano house, but these directions made no sense to Padalino, who had lived and worked in Nogales, Arizona, for three years.

Officer Padalino then approached the vehicle's driver's door where he detected a strong odor of marihuana emanating from an open window. Padalino detected the same odor emanating from the trunk area.

Padalino requested that the defendant open the trunk. The defendant declined, saying that he did not have a trunk key. Padalino then read the defendant his *Miranda* rights and told the defendant that he, Padalino, suspected that there was marihuana in the vehicle. Ultimately, some three hundred five pounds of marihuana were recovered from the vehicle's trunk.

The Court concludes that the above factual summary presents circumstances sufficient for Officer Padalino to have a founded suspicion that criminal activity was afoot. The stopping of defendant's vehicle and the detention of the defendant were therefore justified. The Court further concludes that the circumstances, taken in their entirety, presented Officer Padalino with probable cause to conclude that the defendant had committed or was committing a felony. The arrest was therefore justified. The evidence seized as a result of that arrest was not tainted.

It is therefore ordered that defendant's motion to suppress be denied.

Done and dated this 21st day of January, 1975.

JAMES F. BATTIN,
U.S. District Judge.

(Do Not Publish)

United States Court of Appeals for the Ninth Circuit

No. 75–1595

UNITED STATES OF AMERICA, APPELLEE

v.

CHARLES THOMAS OSBORNE, SR., APPELLANT

MEMORANDUM

(July 3, 1975)

Appeal from the United States District Court
for the District of Arizona

Before: Ely, Hufstedler, Circuit Judges, and Fitzgerald,[1] District Judge.

The facts are too thin to sustain founded suspicion. On remand, the indictment will be dismissed.

---

[1] The Honorable James M. Fitzgerald, United States District Judge, District of Alaska, sitting by designation.

(Do Not Publish)

United States Court of Appeals for the Ninth Circuit

No. 75–1332

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DIANE MOREY, DEFENDANT-APPELLANT

MEMORANDUM

(June 10, 1975)

Appeal from the United States District Court for the District of Arizona

---

Before: Browning, Ely, and Carter, Circuit Judges.

1. There was ample justification for the stop. Appellant slowed down perceptibly as the Customs officers passed in their marked patrol car. The rear of her automobile was riding low, although it was equipped with overload shock absorbers. Her car swerved slightly from side to side "like she was nervous or . . . excited about something." There were handprints on the trunk. A vehicle registration check revealed that the automobile was owned by a person living on East Street in Nogales, Arizona, a notorious smuggling area. Appellant appeared to be Caucasian, but to the officers' knowledge no Caucasians resided in the East Street area.

The district court was not required to reject the officers' testimony because the shock absorbers could not be seen in the photographs introduced by appellant and the rear of the car dropped only slightly when loaded and standing still. The view of the car depicted in the photograph introduced by the government is substantially the same as that presented to the Customs

officers as they followed appellant's automobile, and the shock absorbers are clearly visible. The court could reasonably conclude that the overloaded condition would have been more apparent when the car was moving at highway speeds than when photographed standing still.

2. The record does not support appellant's contention that there were such substantial contradictions between the testimony at trial and at the suppression hearing that the district court erred in denying appellant's renewed motion for suppression without a further hearing.

The alleged inconsistencies with respect to the trunk keys and the time at which the handprints on the trunk were noticed were not argued to the district court. They may not be relied on here in support of the argument that the district court should have granted a new evidentiary hearing on the suppression issue. There was no inconsistency in the testimony regarding the officers' location when they first observed appellant's automobile. Officer Gutierrez adequately explained the alleged inconsistencies with respect to whether the officers had prior information regarding appellant's automobile, whether Gutierrez in fact smelled marihuana at the time of the stop, and the location of the officer's patrol car when they observed the overload shock absorbers on appellant's automobile. The testimony was inconsistent only with respect to the distance the officers followed appellant, the exact location of the stop, and whether appellant appeared to be nervous.

Appellant did not request the trial court to hold a new hearing on the suppression issue. The trial court was asked to consider the suppression issue de novo, and did so. All of the relevant evidence was before the

trial court. Appellant argued the alleged and actual inconsistencies to the court, and the court considered them in denying the motion. Determining the credibility of the officers and weighing the evidence was peculiarly the function of the trial judge. His resolution of the suppression issue was not clearly wrong.

3. Appellant's first admission of the theft of the automobile was made in response to routine questioning as to the ownership of the car, conducted immediately after the stop and before appellant was taken into custody. It was not error to admit it, even though it was made prior to the *Miranda* warning. *See Lowe v. United States,* 407 F. 2d 1391 (9th Cir. 1969).

4. It was not error to give the instruction approved in *United States* v. *Castillo-Burgos,* 501 F. 2d 217, 218–19 (9th Cir. 1974). It was enough that the car was "contraband-laden," i.e., that the contraband was in or attached to the automobile; it was not necessary that the contraband be concealed within the body of the car. *Id.* at 219. *See also United States v. Campbell,* 507 F. 2d 955, 957 (9th Cir. 1974). *And see especially United States v. Martinez,* —F. 2d — (9th Cir. Feb. 28, 1975) (Slip Op. at 6).

The court did not err in failing to specifically advise the jury that they must disbelieve the possibility that the automobile was in fact a stolen car of which appellant had no prior knowledge before they could accept the inference of guilty knowledge. It is doubtful that such an instruction would be required (*United States* v. *Castillo-Burgos, supra,* 501 F. 2d at 219); in any event, it was not requested.

5. The evidence of knowing possession was sufficient. Appellant was the driver and sole occupant of an automobile that had 198 pounds of marihuana in its

trunk. *See United States* v. *Martinez, supra* (Slip Op. at 4–7); *United States* v. *Dixon,* 460 F. 2d 309 (9th Cir. 1972); *United States* v. *Asconlani-Gonzales,* 449 F. 2d 159 (9th Cir. 1971).

Affirmed.

U.S. GOVERNMENT PRINTING OFFICE, 1978